CONLAY CONSTRUCTION SDN BHD A

v.

PEREMBUN (M) SDN BHD

FEDERAL COURT, PUTRAJAYA B
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
AHMAD MAAROP FCJ
ZAINUN ALI FCJ C
[CIVIL APPEAL NO: 02(f)-63-09-2012(W)]
17 OCTOBER 2013

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Whether trial judge had dealt with all issues raised - Uncertainty in grounds of decision of Court of Appeal - Whether Court of Appeal applied correct principle of appellate interference - Whether appellate interference warranted* D

CIVIL PROCEDURE: *Amendment - Appellate stage - Amendment to counterclaim - Court of Appeal allowed amendment rejected by High Court - Whether High Court dealt in sufficient depth in rejection of amendment - Whether High Court delivered correct decision on amendment - Whether Court of Appeal right in reversing decision of High Court on amendment* E

JURISDICTION: *Court of Appeal - Appellate interference - Test for - Whether broadened to include issues stated in broad and general grounds - Whether error allegedly committed by trial judge identified - Whether trial judge plainly wrong - Whether appellate interference warranted* F

This was the appellant/plaintiff's appeal against the decision of the Court of Appeal in reversing the decision of the High Court granted in favour of the plaintiff. The claim in the High Court was brought by the plaintiff against the defendant, *inter alia*, for (i) the value of work done under the initial sub-contract; (ii) variation works; and (iii) for the return of the sum paid on the performance bond pursuant to a demand made by the defendant. The defendant counterclaimed against the plaintiff for the alleged delay, cost of rectification and defective works. The High Court decided in favour of the plaintiff. The defendant thus appealed to the Court of Appeal. The Court of Appeal allowed the defendant's appeal and set aside the order of the High Court. However, there G H I

was no pronouncement by the Court of Appeal as to whether the matter was to be remitted to the High Court for a retrial and neither was there any pronouncement made that the plaintiff's claim was to stand dismissed. There was also no pronouncement on the defendant's counterclaim. Upon the plaintiff's application, leave was granted by the Federal Court on the questions, *inter alia*, (i) whether the test for the appellate interference had been broadened to include the ground that the issues for trial had been stated in very broad and general grounds; (ii) whether it was correct to set aside an order of the High Court after a full trial on these grounds without identifying the error, if any, that the trial judge was said to have committed in adjudicating the issue; (iii) whether the test for allowing an amendment to the pleadings that was made after evidence had been fully adduced had been liberalised to allow the amendment for so long as an order for costs was sufficient to compensate, and if the Court of Appeal was to hold that the trial judge ought to have allowed the amendment, then, whether the dispute ought not then be remitted to the High Court for a retrial.

Held (allowing appeal with costs; setting aside order of Court of Appeal and restoring order of High Court)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) The case before the High Court was one that involved findings of facts and there was no cause for the Court of Appeal to have intervened to set aside the decision of the High Court in the circumstances of the case. Unless it was found that the learned trial judge was plainly wrong, it was not open for the Court of Appeal to have intervened even to the limited extent of ordering retrial. (para 10)

(2) The learned trial judge had dealt with the issues raised by the defendant, *inter alia*, on the issue of variation works, counterclaim and defective works. Having noted that the learned trial judge had gone through all evidence, both oral and documentary, and had given reasons to such findings which the Court of Appeal was not in a position to controvert, the Court of Appeal was wrong in exercising its powers of appellate interference. More so, when the Court of Appeal was found uncertain in its grounds of judgment for its decision whether to order a retrial of the case or not. Clearly,

the Court of Appeal, in revising the decision of the High Court, had not correctly applied the principle of appellate interference. (paras 12-15)

(3) The Court of Appeal, in their judgment, had allowed the application by the defendant to amend the counterclaim which the learned trial judge had rejected. The learned trial judge had dealt in sufficient depth in this matter and had delivered the correct decision insofar as the amendments were concerned. The learned trial judge was mindful of the fact that this was an amendment that was made late in the day after the witnesses had been called to give evidence and tested by cross-examination and the parties had closed their case. In the circumstances, the Court of Appeal was wrong in reversing the decision of the learned trial judge on the issue of amendment. (paras 16, 17 & 18)

(4) Even if the learned trial judge was wrong in refusing the amendment, the Court of Appeal ought then to have proceeded to consider the appeal on its merits with the benefits of the amendment which the Court of Appeal had failed to do. Hence, the learned trial judge was correct in so far as the merits of the case were concerned in refusing the defendant's application for amendment. (para 18)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu/plaintif terhadap keputusan Mahkamah Rayuan dalam mengakas keputusan Mahkamah Tinggi yang diberikan memihak kepada plaintif. Tuntutan di Mahkamah Tinggi dibawa oleh plaintif terhadap defendan, antara lain, untuk (i) nilai kerja yang dilakukan di bawah subkontrak awal; (ii) kerja-kerja perubahan; dan (iii) bagi pemulangan jumlah yang dibayar atas bon pelaksanaan berikutan tuntutan yang dibuat oleh defendan. Defendan menuntut balas terhadap plaintif bagi kelewatan, kos pembaikan dan kerja-kerja yang cacat. Mahkamah Tinggi memutuskan memihak kepada plaintif. Defendan, dengan itu, merayu kepada Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan perayu dan mengenepikan perintah Mahkamah Tinggi. Walau bagaimanapun, tiada keputusan oleh Mahkamah Rayuan sama ada perkara tersebut perlu dikembalikan kepada Mahkamah Tinggi untuk perbicaraan semula dan tiada keputusan diberikan bahawa tuntutan plaintif kekal ditolak. Juga,

tiada keputusan dibuat terhadap tuntutan balas defendan. Atas permohonan plaintif, kebenaran diberikan oleh Mahkamah Persekutuan atas persoalan, antara lain: (i) sama ada ujian untuk campur tangan rayuan telah diperluaskan lagi untuk memasukkan alasan bahawa isu-isu untuk perbicaraan dinyatakan dengan alasan luas dan umum; (ii) sama ada adalah betul untuk mengenepikan perintah Mahkamah Tinggi selepas perbicaraan penuh atas alasan-alasan ini tanpa mengenalpasti kekhilafan, jika ada, bahawa hakim bicara dikatakan telah lakukan dalam memutuskan isu tersebut; (iii) sama ada ujian untuk membenarkan pindaan kepada pliding yang dibuat selepas keterangan dikemukakan keseluruhannya telah diliberalisasikan untuk membenarkan pindaan yang boleh dipampas dengan perintah untuk kos, dan jika Mahkamah Rayuan memutuskan bahawa hakim bicara wajar membenarkan pindaan, maka, sama ada pertikaian tersebut mesti dikembalikan kepada Mahkamah Tinggi untuk perbicaraan semula.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Rayuan dan mengembalikan perintah Mahkamah Tinggi)

Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Kes di hadapan Mahkamah Tinggi adalah suatu yang melibatkan dapatan fakta dan tiada kausa untuk Mahkamah Rayuan campur tangan untuk mengenepikan keputusan Mahkamah Tinggi tersebut dalam keadaan kes. Kecuali didapati bahawa yang arif hakim bicara jelas terkhilaf, Mahkamah Rayuan tidak boleh campur tangan walaupun setakat yang terhad untuk memerintahkan perbicaraan semula.

(2) Yang arif hakim bicara telah mempertimbangkan isu-isu yang dibangkitkan oleh defendan, antara lain, mengenai isu perubahan kerja-kerja, tuntutan balas dan kerja-kerja yang cacat. Setelah meneliti bahawa yang arif hakim bicara telah mempertimbangkan kesemua keterangan, lisan dan dokumentari, dan telah memberikan alasan-alasan untuk dapatan tersebut yang Mahkamah Rayuan tidak boleh pertikaikan, Mahkamah Rayuan khilaf dalam melaksanakan kuasa-kuasa campur tangan rayuan. Lebih-lebih lagi, apabila Mahkamah Rayuan didapati tidak pasti dalam alasannya mengenai penghakiman keputusannya sama ada untuk memerintahkan perbicaraan kes

tersebut atau tidak. Jelas, Mahkamah Rayuan dalam mengakas keputusan Mahkamah Tinggi tidak mengguna pakai, prinsip campur tangan rayuan, dengan betul.

(3) Mahkamah Rayuan, dalam penghakimannya, telah membenarkan permohonan defendan untuk meminda tuntutan balas yang mana telah ditolak oleh yang arif hakim bicara. Yang arif hakim bicara telah mempertimbangkan secara mendalam perkara ini dan telah memberikan keputusan yang betul setakat mana melibatkan pindaan tersebut. Yang arif hakim menyedari fakta bahawa ini adalah pindaan yang dibuat terlalu lewat selepas saksi-saksi telah dipanggil untuk memberikan keterangan dan diuji melalui pemeriksaan balas dan pihak-pihak telah menutup kes mereka. Dalam keadaan tersebut, Mahkamah Rayuan terkhilaf dalam mengakas keputusan yang arif hakim bicara atas isu pindaan.

(4) Walaupun yang arif hakim bicara khilaf dalam menolak pindaan, Mahkamah Rayuan sepatutnya meneruskan untuk mempertimbangkan rayuan atas merit dengan faedah pindaan tersebut yang mana Mahkamah Rayuan gagal berbuat demikian. Maka, yang arif hakim bicara adalah betul setakat yang melibatkan merit kes dalam menolak permohonan defendan untuk pindaan.

Case(s) referred to:

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Ketteman & Ors v. Hansel Properties Ltd [1988] 1 All ER 38 ***(refd)***

Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(refd)***

Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeals [1999] 4 CLJ 651 HC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

For the appellant - Robert Lazar (Felix Dorairaj & Aarthi Jeyarajah with him); M/s Dorairaj Low & Teh

For the respondent - Ramdas Tikamdas (N Devian with him); M/s Devan & Assocs

[Appeal from Court of Appeal; Civil Appeal No: W-02-2155-2010]

Reported by S Barathi

A

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

B **[1]** This is an appeal by the appellant against the decision of the Court of Appeal in reversing the High Court decision in favour of the appellant. The appellant was the plaintiff and the respondent was the defendant in the consolidated actions in the High Court. We will refer to the parties as they were before the High Court.

C

[2] Leave to appeal was granted by this court on the following questions:

(a) Whether the test for appellate interference has been broadened to include the ground that the issues for trial have D been stated in very broad and general grounds.

(b) Whether it is right to set aside an order of the High Court after a full trial on these grounds without identifying the error, if any, that the trial judge is said to have committed in E adjudicating on the issue.

(c) Whether the test for allowing an amendment to the pleadings that is made after evidence has been fully adduced has been liberalised to allow the amendment for so long as an order for F costs is sufficient to compensate, and if the Court of Appeal was to hold that the trial judge ought to have allowed the amendment, then whether the dispute ought not then be remitted to the High Court for a re-trial.

G

Background Facts

[3] The relevant background facts of the case may be summarised as follows:

(a) By a letter of acceptance of tender dated 13 March 2001, H the defendant was appointed as the contractor to design, build and complete the secondary school at Section 7, Shah Alam, Selangor Darul Ehsan ("the project") by the Ministry of Education ("MOE") as the employer.

I

(b) By a letter of award dated 28 March 2001, the defendant appointed the plaintiff as its sub-contractor for the project on the terms and conditions contained therein for the sum of RM7,480,000 ("the sub-contract"). The details of the sub-contract are as follows:

(i) the contract was a fixed lump sum price contract;

(ii) the site possession date was 27 March 2001;

(iii) the completion date was 12 months from the date of possession that is 26 March 2002;

(iv) the plaintiff shall produce a performance bond to the defendant. The same was procured from OCBC Bank for the sum of RM374,000;

(v) defect liability period is 24 months from the date of completion of the sub-contract works;

(vi) the plaintiff will be imposed LAD at RM1,000 per day of delay for breach of the relevant works from completion beyond the schedule target dates;

(vii) progress claim will be paid within 14 days after receipt of payment from the client (MOE); and

(viii) the defendant shall be entitled to deduct from any set-off against any money due from him to the plaintiff which the plaintiff is liable to pay to the defendant which the plaintiff received prior notice in writing of the defendant's intention to set-off the amount quantified and the grounds upon which such set-off is claimed to be made.

(c) The sub-contract had special conditions attached to it *inter alia*:

(i) If within seven days upon receipt of the defendant's project manager's instructions in writing, the plaintiff does not comply physically to execute the works or is not in compliance to the instructions issued, the defendant may employ a third party or other persons to execute the works and any additional costs is recoverable from the plaintiff plus a management fee of 10%;

A (ii) The plaintiff to notify the defendant (with the appropriate contract clauses) as for the cause of variation claims and any other contract provisions if so desired that the plaintiff deemed to be entitled, within 26 days of the events being incurred or thereupon the B claim shall be treated null and void; and

(iii) The unit rates in the sub-contract shall be deemed to be firm with no provision for price fluctuation throughout the sub-contract period.

C (d) The rates for the work in the sub-contract were lower and different from the rates in the main contract.

(e) On 7 August 2003, the defendant issued a demand on the performance bond. OCBC Bank paid and the defendant D received the sum of RM374,000 as performance bond on 14 August 2003.

(f) During the subsistence of the sub-contract the defendant issued eleven payments certificates totalling RM6,887,691 E for the period ending 18 April 2002. The defendant had paid the sum of RM6,887,691 under the sub-contract.

(g) The claim in the High Court was brought by the plaintiff against the defendant and it comprised three main items as F follows:

(i) The value of work done under the initial sub-contract;

(ii) A claim for variation works which in turn can be sub-divided into two parts:

G (a) variation directed by the client (MOE); and

(b) that directed by the defendant.

(iii) A claim for the return of the sum paid on the H performance bond pursuant to a demand made by the defendant.

(h) The defendant had a counterclaim against the plaintiff for alleged delay, cost of rectification and defective works.

I

Proceedings Before The High Court

[4] At the High Court the agreed issues for trial by the parties were as follows:

(a) What is the total value of work done by the plaintiff under the sub-contract and consequently the amount due (if any) from the defendant to the plaintiff in respect of work done under the sub-contract;

(b) What (if any) is the total amount the defendant is entitled under the terms of the sub-contract to deduct or set-off from the total value of works done by the plaintiff under the sub-contract;

(c) Consequent to the forgoing was the defendant entitled to issue a demand on the performance bond and receive payment thereon in the sum of RM374,000; and

(d) Is the plaintiff after taking account of (a) and (b) above entitled to a full refund of RM374,000 or part thereof inclusive of interest.

[5] After a full trial and after having heard the oral evidence and considered the documentary evidence, the learned trial judge of the High Court found in favour of the plaintiff and entered judgment for the plaintiff as follows:

(i) A sum of RM250,987.65 being the value of the work (excluding variations);

(ii) A sum of RM238,506.76 being the value of variation orders as directed by the Ministry of Education (MOE); and

(iii) A sum of RM264,275.20 being the value of variation orders that were non-MOE directed.

In addition, the learned judge of the High Court also gave judgment to the plaintiff in the sum of RM374,000 being the value of the performance bond that the defendant had made on demand and which had been paid.

Proceedings Before The Court Of Appeal

[6] The defendant appealed to the Court of Appeal and after hearing arguments on the 7 March 2011, the Court of Appeal merely allowed the defendant's appeal and set aside the order of

the High Court. When the Court of Appeal pronounced its decision, there was no pronouncement by the Court of Appeal as to whether the matter was to be remitted to the High Court for a re-trial. Neither did the Court of Appeal make any pronouncement that the plaintiff's claim was to stand dismissed. There was also no pronouncement on the defendant's counter-claim.

[7] After the application for leave at the Federal Court had been filed, the plaintiff received a copy of the grounds of judgment of the Court of Appeal. The grounds of judgment disclosed that the Court of Appeal had in fact ordered a re-trial. In order to obtain the clarification of the Court of Appeal, and if necessary, to have the order amended, the plaintiff then proceeded to file a notice of motion with the Court of Appeal asking for a clarification. The notice of motion was heard by the same coram of the Court of Appeal on 27 April 2012. The learned judges of the Court of Appeal clarified that they had not ordered a re-trial but that only the order of the High Court was to be set aside. The Court of Appeal also stated that there was an error in the last para. (26) of the grounds of judgment and that the error will be rectified.

Decision Of This Court

[8] We will first deal with Questions No. 1 and No. 2 posed before this court together as they relate to the issue of the test on appellate interference.

[9] On the clarification made by the Court of Appeal that they had not ordered a re-trial of the case and to that effect they had made an amendment to para. (26) of the grounds of judgment, it is noted that there are other paragraphs in the said grounds of judgment which still suggest that the Court of Appeal was of the considered opinion that the dispute ought to be sent for a re-trial in the High Court. This is to be found particularly in paras. (17) and (22) of the grounds of judgment of the Court of Appeal. This is therefore at odd with the clarification that the Court of Appeal made on 27 April 2012 as submitted by learned counsel for the plaintiff.

[10] We are of the view in the present case that even if the Court of Appeal had merely reviewed the proceedings in the High Court for the purposes of determining whether to send the matter for a re-trial, there is no room for appellate intervention. There is

no cause for the Court of Appeal to have intervened to set aside the decision of the High Court in the circumstances of this case. The Court of Appeal can only do so in a case of this nature, if the learned trial judge was plainly wrong in coming to her decision. The case before the High Court was one that involved findings of facts. In such a case, it is our view that unless it was found that the learned trial judge was plainly wrong, it was not open for the Court of Appeal to have intervened even to the limited extent of ordering a re-trial.

[11] The crux of the dispute between the parties as contended by the defendant was on the plaintiff's claim for alleged variation works in the sum of RM701,940.06 pursuant to 22 variation orders. Learned counsel for the defendant submitted that the learned trial judge had relied on as a fact that based upon the defendant's letter dated 8 October 2002, the defendant had objected to only four items of the variation orders out of the detailed lists set out. The defendant contended before the Court of Appeal on this disputed issue that the learned trial judge was wrong in coming to the conclusion that based on the said letter dated 8 October 2002 objecting only to four items, the others were deemed admitted. The Court of Appeal agreed with the contention of the defendant and was of the view that the learned trial judge failed to address the question of proof of whether the variation works were authorised and if so of the value of work done.

[12] With respect to the above contention of the defendant on the issue of variation works, we are of the view there is no justification for appellate intervention by the Court of Appeal on the findings made by the learned trial judge. A closer analysis of the learned trial judge's grounds of judgment would show that the judge did consider the effect of cross-examination of DW1, the director of the defendant company on this issue of variation works and the correspondence between the parties in addition to the letter of 8 October 2002.

[13] It is to be noted that in so far as the variation orders as directed by the Ministry of Education (MOE) were concerned, the learned trial judge dealt with it at paras. 13 and 14 of her grounds of judgment and in fact took into account the evidence of PW2, an engineer employed as project manager by MOE for the

implementation of the project. MOE was the client of the defendant in this case and the evidence of PW2 therefore would have been the most preferable as it was not self-serving.

[14] The learned trial judge also dealt with the various items of the counterclaim that were brought by the defendant and dealt with them at paras. 17 to 21 of the grounds of judgment. This matter was not dealt with by the Court of Appeal at all in its grounds of judgment. As for the items of defective works, which the defendant had alleged, the learned trial judge dealt with them at paras. 22 and 23. Again this was not dealt with by the Court of Appeal. On the issue of the performance bond, this was dealt with by the learned trial judge at paras. 26 to 27 of the grounds of judgment. Again this issue was not addressed by the Court of Appeal in its grounds of judgment.

[15] Having noted that the learned trial judge had gone through all evidence both oral and documentary and had given reasons to such findings which the Court of Appeal was not in a position to controvert, we are of the view that the Court of Appeal was wrong in exercising its powers of appellate interference. More so in the present case when the Court of Appeal was found uncertain in its grounds of judgment for its decision whether to order a re-trial of the case or not. Clearly the Court of Appeal in revising the decision of the High Court had not correctly applied the principle of appellate interference (See the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1).

[16] We will now deal with Question No. 3 posed before this court on the issue of amendment made at the trial after close of evidence given by both parties. The defendant applied to amend the counterclaim after both sides had closed their respective case. There was no formal or written application made by counsel for the defendant. The application was contained in the written submission of the defendant after trial. The learned trial judge rejected the application to amend and gave reasons for her rejection. The Court of Appeal in their judgment stated that they would allow the amendment and gave their reasons *inter alia*:

> But objection on the ground of delay alone is insufficient. It is to ensure that *bona fide* issues are dealt with and a fair and just decision is delivered at the end of a case. For that reason, the authority (*sic*) favour allowing the application so long as if any

injustice caused thereby can be compensated with an order of costs. The grounds of decision and the notes of proceedings show that the question was not fully considered in depth.

[17] With respect to the Court of Appeal's reasoning in allowing the amendment, we are of the view the learned trial judge in fact did go into this matter in sufficient depth and delivered the correct decision in so far as the amendments were concerned. The learned trial judge was mindful of the fact that this was an amendment that was made late in the day after the witnesses have been called to give evidence and tested by cross-examination and the parties had closed their case. The learned trial judge had correctly supported her decision by citing a number of case authorities on settled principles of application for amendment of pleadings as follows:

(a) *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213.

(b) *Ketteman & Ors v. Hansel Properties Ltd* [1988] 1 All ER 38.

(c) *Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeals* [1999] 4 CLJ 651; [1999] 6 MLJ 622.

(d) *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830; [2001] 1 MLJ 49.

[18] In the circumstances of this case it is our judgment that the Court of Appeal was wrong in reversing the decision of the learned trial judge on the issue of amendment. Even if the learned trial judge was wrong in refusing the amendment, the Court of Appeal ought then to have proceeded to consider the appeal on its merits with the benefit of the amendment. This the Court of Appeal did not do. The learned trial judge in our view in any event was correct in so far as the merits of the case were concerned in refusing the defendant's application for amendment.

Conclusion

[19] For the reasons abovestated we would allow the plaintiff's appeal with costs. The order of the Court of Appeal is hereby set aside and consequently the order of the High Court is restored.